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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 664

GEORGE LESTER BALL, ET AL., *Petitioners,*

v.

EASTERN COAL CORPORATION, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

BRIEF OF RESPONDENT EASTERN COAL CORPORATION IN OPPOSITION

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OPINIONS BELOW

The Pike Circuit Court, on November 20, 1964, made Findings of Fact, Conclusions of Law and entered an order and judgment in this case, all of which appear in the Appendix to this Brief at pp. 1a-6a. The Court of Appeals of Kentucky unanimously affirmed such

judgment on March 24, 1967, in its opinion published in 415 S.W. 2d 620, and printed in the Appendix to Petitioner's Brief (pp. 50-62).

JURISDICTION

Respondent Eastern Coal Corporation[1] denies jurisdiction to issue a Writ of Certiorari in this case under USCA 2101(c), because Petitioners failed to file their Petition "*within ninety days after the entry of*" the judgment complained of. And, since the filing of the Petition was not timely, Section 301(a) of the Labor Management Relations Act, 1947 (29 USCA 185) should not come into play or have a bearing.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

(a) Was there a timely filing of the Petition in this case and, if not, is late filing jurisdictional?

(b) Even assuming that late filing of the Petition is not jurisdictional, is this a case where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court?

(c) Again assuming that late filing is not jurisdictional, are there *special* or *important* reasons why the Writ should be granted?

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[1] Hereafter called "Eastern". United Mine Workers of America will hereafter be called "UMW". The abbreviation "A" refers to the appendix to this brief; the abbreviation "P.B." refers to Petitioners' Brief; the abbreviation "A.P." refers to the appendix to Petitioners' Brief; and the abbreviation "R" refers to the record in the Court of Appeals of Kentucky. *All emphases are supplied unless otherwise noted.*

COUNTERSTATEMENT OF THE CASE

The Pertinent Facts Are Clear and Simple

Eastern, prior to May 17, 1953, conducted coal mining operations on a boundary of coal land in Pike County, Kentucky. The production of coal from Mine Nos. 3, 4 and 8 fed into and was loaded over the No. 8 Tipple. The area comprising numerically designated Mines 3, 4 and 8, was generally referred to as Mine No. 8, and all the miners working in such area belonged to UMW Local No. 5737. The production from Mine Nos. 7, 7½ and 9 fed into and was loaded over the No. 7 Tipple, and the area comprising numerically designated Mines 7, 7½ and 9 was generally referred to as Mine No. 7, and all the miners working in such area belonged to UMW Local No. 5729 (R. 63).

In September, 1952, a new preparation plant was completed at the No. 8 Tipple and the plan was to bring all coal mined at the Nos. 7 and 7½ Mines through the inside workings of Mine No. 8 and handle it together with the production from Mines 3, 4 and 8 over the No. 8 preparation plant and tipple. This plan—the underground connection between Mine No. 8 and Mine No. 7—was completed on May 17, 1953. The No. 7 tipple was then abandoned and the No. 7 portal was thereafter used only for ready access for men and supplies. At that time, specifically May 17, 1953, there were employed at Mines 7 and 7½ (No. 9 was closed on May 15, 1953) together 482 men and at Mines 3, 4 and 8 together 501 men (R. 64).

Prior to May 17, 1953, Mines 7 and 7½ were connected underground, as were Mines 3 and 8. Mines 4 and 8 were connected by trestle (R. 63). As pointed out above, the miners working in Mine Nos. 3, 4 and

8 belonged to UMW Local No. 5737, and those working in Mine Nos. 7 and 7½ belonged to UMW Local 5729. Throughout the history of Eastern's operation in this boundary of coal land, when mine workers in an area under the jurisdiction of a particular local transferred from one portion of such area to another, the seniority of one so transferring was not affected. On the other hand, and by way of illustration, if a miner working in No. 4 Mine, an area under the jurisdiction of Local No. 5737, transferred to Mine No. 7, the area under the jurisdiction of Local No. 5729, he became a "new man", and his services, insofar as seniority was concerned, commenced *when he transferred* (R. 66).

When, on May 17, 1953, the mine workings between No. 8 Mine and No. 7 Mine were cut together, establishing the first physical connection between those two mines, and resulting in the coal produced in Nos. 7 and 7½ being hauled underground to and loaded over the No. 8 Preparation Plant and Tipple, there was brought into play Section 3, Article XIV of the UMW's Constitution, which provides that "No mine shall be under the jurisdiction of more than one Local Union" (R. 64). By reason of such connection and constitutional provision, the Secretary-Treasurer of UMW District 17 wrote Eastern under date of June 17, 1953, and, in the opening paragraph, stated:

> "Acting under the authority of the instructions from the International Officers of the United Mine Workers of America, you are advised that effective immediately upon receipt of this letter, jurisdiction over your employees who are members of the United Mine Workers of America are transferred from Local Union 5729 to Local Union 5737". (R. 65).

It appears this letter was written the day following the action by the International Officers, for in a letter dated May 27, 1955, from the Executive Board of (UMW) District 17 to the Recording Secretary of Local 5737, it is stated: . . . "On June 16, 1953, Local Union 5729 and Local Union 5737 were consolidated into one local union on the grounds that one mine could not be under the jurisdiction of two local unions."

This action by UMW's International Officers evoked no controversy or complaint at the time it occurred. It so happened, however, that some 33 men transferred from the area comprising Mines 7 and 7½ to the area comprising Mines 3, 4 and 8 *between* May 17, 1953, the date of the completion of the underground connection of Mine 7 with Mine 8, and June 16, 1953, the date UMW consolidated Local 5729 into Local 5737 (R. 66). When a few men were laid off by Eastern on June 26, 1953, Eastern considered with the Local Mine Committee just how the list [2] should be made, and at such time the parties agreed June 16, 1953—the date UMW consolidated the two locals—should be used for purpose of determining the respective seniorities of members of the merged local (No. 5737). But on October 26, 1953, there was another reduction in the working force and again Eastern prepared its list predicated on June 16, 1953, as the controlling date. Some of the affected employees, however, were dissatisfied with the decision and appealed to higher UMW authority, and on such appeal the then President, the then Vice President and the then Chief Field

[2] As here used, means a list of employees to be laid off or idled by a reduction in working force and whose names are placed in a panel from which they shall be returned to employment on the basis of seniority.

Representative of District 17 *held that May 17, 1953,* when the two mines were physically united, *and not June 16th,* was the effective date of the consolidation and the date as of which the seniority of the respective employees should be determined. That decision was communicated to the Local Mine Committee by letter dated November 2, 1953, and that Committee promptly took it up with Eastern as a matter *to be negotiated further under the Agreement.* Eastern agreed with the Local Mine Committee and adjusted its payroll to conform to the UMW position. This was done at November 9, 1953 (R. 66).

Twenty-four of the employees who were laid off on October 26, 1953, and reinstated as of November 9, 1953, engaged an attorney to assert against Eastern claims totaling $2,792.58 for loss of earnings while laid off. The claims were rejected, and thereupon certain of these employees filed charges against Eastern (Case No. 9-CA-783) and against Local Union 5737 (Case No. 9-CB-215) with the National Labor Relations Board at Cincinnati. The charges were referred to Field Examiner Kennedy, who made an investigation into the relevant facts, and on April 16, 1954, Regional Director Evans notified the parties of his refusal to issue a Complaint in these matters. Six days later—April 22, 1954—eight of the employees who had been laid off within the preceding four weeks (all of which are listed among the petitioners in the instant case against Eastern and UMW), filed charges against Local Union 5737 with the NLRB at Cincinnati. Following investigation, the Regional Director declined to issue a complaint (R. 67), and on appeal to the General Counsel and Office of Appeals, the Regional Director was sustained (R. 72).

Certain of the petitioners were laid off or furloughed in a working force reduction made by Eastern on December 1, 1953, and others in the reduction made in March and April, 1954, lists for both of which were prepared in accordance with the November 2, 1953 decision. Their disappointment prompted them to take steps to have the question considered again by UMW's District 17 Board and, as appears from its written report dated May 27, 1955, the Board in substance affirmed the ruling of November 2, 1953.

Thereafter, the aggrieved employees appealed to UMW, whose President named a Commission of the International Union, composed of two members of the UMW Executive Board, which, after hearing appellants and their witnesses, reported to President Lewis under date of November 16, 1955, and recommended that the opinion of District 17 Executive Board of May 15, 1955, be sustained (R. 69).

Some six months later, May 16, 1956, to be exact, a committee representing the aggrieved employees went to Washington, D. C., and presented to the International Executive Board of UMW their appeal from the November 16, 1955, report and recommendation of the Commission. The International Executive Board, after hearing the Committee and others on May 17, 1956, approved and affirmed the recommendation of the Commission (R. 69).

Eastern took no part in any of the proceedings within the UMW.

About five and a half years later—the Fall of 1961—these Petitioners, numbering 177, brought this action in the Pike Circuit Court (Pike County, Kentucky) where, on November 20, 1964, Judge Stephenson ren-

dered judgment in favor of all the Respondents. This judgment, as hereinabove stated, was affirmed by the Court of Appeals of Kentucky, to which Court an appeal was taken.

Petitioners Careless in Their Statement of the Case

At the bottom of page 10 (P.B.) they state:

> "The employer, Eastern Coal Corporation, became dissatisfied with the method that it was required to use in furloughing the plaintiffs and filed complaint with the International Union. (See Appendix "B", Report of Tom Raney, International Executive Board Member, dated June 7, 1955)."

This statement just doesn't jibe with the facts and has no place or pertinency in this case. Counsel for Eastern first learned of the existence of the *Raney Letter* in 1964, when Mr. Cunningham, Counsel for Petitioners, asked whether the complaint mentioned by Mr. Raney was made by letter or in writing, and if so, he would like a copy. After a diligent but unsuccessful search had been made, Counsel for Petitioners was so advised. Shortly thereafter, and at the hearing held by the Trial Judge for the purpose of reaching an agreed statement of facts of this case, Counsel for Petitioners brought up the *Raney Letter* but the Trial Judge omitted any reference to the *Raney Letter* in the "Stipulation of Facts" (R. 59-69), or the "Further Stipulation of Facts" (R. 70-72).

For many and obvious reasons, the *Raney Letter* is not relevant. In the first place, assuming *arguendo* that there was a complaint, it does not purport to pertain to the reductions in working force involved here; in the second place, the *Raney Letter* was an in-

traunion communication written June 7, 1955, some fifteen months after the cut-offs complained of by Petitioners; in the third place, the *Raney Letter* was written eleven months *before* the Committee representing Petitioners appeared in Washington, D. C., to present their appeal from the November 16, 1955, report and recommendation of the Commission. Suffice it to say that had the subject matter of the *Raney Letter* been considered relevant to this controversy, it would have been discussed and reported on by the Commission of the International Union in its report of November 16, 1955, to Mr. John L. Lewis, President of UMW, and made a part of the Stipulation of Facts in this case (R. 68-69).

At the top of page 11 (P.B.) they state:

> "These plaintiffs were cut-off or furloughed from employment at Eastern's Mines Nos. 4 and 8, and were replaced by employees of Eastern Coal Corporation that had been transferred from Eastern's Mine No. 7, in June 1953, and thereafter. The employees retained in the places of these plaintiffs had less service in mines Nos. 4 and 8 than the plaintiffs."

This statement lacks factual foundation. To start with, the only evidence in this record concerning employees who transferred from the area comprising Mines 7 and 7½, to the area comprising Mines 4 and 8, in June, 1953, and thereafter, is found in the Stipulation of Facts and reads: . . . "Some 33 men transferred from Mines 7 and 7½ to Mines 3, 4 and 8 in the interval between May 17, 1953 and June 16, 1953." . . . (R. 66, line 6-8). Apparently they were among those laid off on October 26, 1953, who appealed to higher UMW authority and obtained reinstatement by reason of the decision of November 2, 1953. (R. 66).

As pointed out above, when Mines 7 and 8 were connected on May 17, 1953, there were 501 men working in Mines 3, 4 and 8 and 482 men working in Mines 7 and 7½. (R. 64). Put another way, that gave the surviving Local Union (No. 5737) a total membership of 983. In the report of the International Commission, from which quotations appear in the Stipulation of Facts (R. 68), we find:

> "On March 31, 1954, a reduction in the working force was made and approximately 465 men were laid off. The Company used the payroll seniority plan in the lay-off, *to which the appellants did not object.*" . . .

It seems quite obvious that what Petitioners really mean is that when the two locals were consolidated or merged and the seniority lists of the two were put together or dovetailed, the deep cuts in working force made by Eastern in the period between May 17, 1953 and April 1, 1954, resulted in their names being reached for cut-off simply because they did not have as much payroll seniority as those who were retained. These cut-offs, to be sure, affected all men whose names were on the seniority list, whether they had formerly worked in Mines 4 and 8 or Mines 7 and 7½.

Separate Openings Merely Component Parts of One Extensive Mine Operation

Petitioners devote much of their "Statement of the Case"—actually from near the top of page 13 to a point near the bottom of page 19 (P.B.)—in narrating information from reports to the Kentucky Department of Mines or the Federal Bureau of Mines in the obvious attempt to show multiple mines, though both Eastern and UMW have treated this operation as one mine. This point is belabored by Petitioners notwithstanding

the opinion of the Court of Appeals of Kentucky in this case, which held: "... Thereafter, though Eastern continued its separate numerical designations of the various mine entries for the purpose of work assignments and inspection reports, and the Union also continued to recognize such separate identities in its correspondence relating to safety inspections, *for purposes of payroll and seniority they were and have been treated as one and the same mine.*" (P.B., last sentence beginning bottom page 53).

The Kentucky Cases Cited by Petitioners Are Not Applicable

In support of their Proposition No. 1, Petitioners cite four Kentucky cases (P.B. 20). For the sake of brevity we will refer to them as the *Bridges Case,* the *Gatliff Case,* the *Hill Case* and the *Piercy Case.* These same cases were relied upon by them before the Pike Circuit Court and the Court of Appeals of Kentucky. In *Piercy* (248 S.W. 1042), Petitioners quote at length from the opinion (P.B. 24). Suffice it to say that in relying on these cases, they obviously are grasping at straws. Judge Palmore, in his opinion in this case, discusses at length the *Piercy Case,* and has this cogent observation about it:

> "Appellants rely heavily on a principle that in our opinion is no longer the law. That principle, stated and applied in *Piercy* v. *Louisville & N. Ry. Co.,* 198 Ky. 477, 248 S.W. 1042, 33 ALR 322 (1932), is that a labor union 'is not the agent of the member for the purpose of waiving any personal right he may have, but is only his representative for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions,' and does not have the authority to adjust or agree to a modification of his seniority rights under a contract between this union and the employer." (P.B. 55).

ARGUMENT

1. Petitioners Failed To File Their Petition and a Transcript of the Record in This Case Within Ninety Days After the Judgment Complained of Became Final

The decision of the Court of Appeals of Kentucky in the instant case was announced on March 24, 1967, and the Petition for rehearing was overruled on June 27, 1967, not June 30, 1967, as stated by Petitioners (P.B. 1). The instant Petition was filed with the Clerk of this Court on September 28, 1967, and not within ninety days after the judgment of the Court of Appeals of Kentucky became final as required by Rule 22(1) of this Court and 28 USCA 2101(c). Since late filing is jurisdictional, it seems clear that this Petition should be dismissed. See: *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 37 L. ed. 719; also *Hope Basket Co.* v. *Product Advancement Corp.*, 342 U.S. 833, 96 L. ed. 630, 72 S. Ct. 44.

In the *Toledo Case* this Court, speaking through Mr. Chief Justice Taft, said:

> "It is insisted by counsel for petitioner that it is within our power and it is our duty on this writ to go into the merits of the issue of the validity of the Smith patent and of the correctness of the money decree for profits. We were asked to do this by an application for writ of certiorari which we denied January 9, 1922 . . . . The decree then sought to be reviewed was entered in October, 1921. The application for this second writ of certiorari was not made until May 22, 1922, more than three months after the final decree in the Circuit Court of Appeals for the payment of profits. Section 6 of the Act of September 6, 1916 . . . directs:
>
> 'That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entered

unless duly applied for within three months [3] after entry of the judgment or decree complained of.'

This deprives us of jurisdiction to consider the merits of the decree of October, 1921."

And in *Federal Trade Commission* v. *Minneapolis-Honeywell,* 344 U.S. 206, 97 L. ed. 245, 73 S. Ct. 245, in which Mr. Chief Justice Vinson, speaking for a majority of the Court, said:

> "The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period (90 days) allowed by law (28 USCA 2101(c)). We hold that it was not." (97 L. ed. p. 249.)

2. Even Though Such Petition Had Been Filed on Time, This Is Not a Case Where a State Court Has Decided a Federal Question of Substance, Not Theretofore Determined by This Court, or Has Decided It in a Way Probably Not in Accord With Applicable Decisions of This Court

When this suit was instituted in the Pike Circuit Court on December 5, 1961, there was pending before the Court of Appeals of Kentucky the case of *Moore* v. *Local Union 89* (Ky.), 356 N.W. 2d 241. The pronouncements of the opinion in that case, handed down on February 13, 1962, were arguably in disaccord with applicable decisions of this Court. But after this Court reversed the *Moore Case,* in its opinion reported at 375 U.S. 335, 84 S. Ct. 363, both the Trial Court and the Court of Appeals of Kentucky (P.A. 50-62) followed closely the principles enunciated by this Court in that opinion and the cases cited therein. Actually, it is difficult to conceive of a decision of a state court which follows more closely the applicable decisions of this Court.

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[3] 90 days under present statute (28 USCA 2101(c)).

3. There Are No Special or Important Reasons Here Why the Writ Applied for Should Be Granted

Rule 19 of this Court requires "special and important reasons" for the issuance of a Writ of Certiorari. At no place is there asserted in this Petition that any such reasons exist. The explanation for this omission is obvious—since none exists, none can be asserted.

On the other hand, there is every reason why this Writ should be denied. This is the fourteenth time Petitioners have pressed their claim before a judicial or quasi-judicial body with jurisdiction to decide the case on its merits. The case is now in its 14th year. Surely, in all these years and before all these bodies, if Petitioners had a meritorius case, some Commission or Board or Court would have so found. Of course, the fact is all such bodies recognized that Eastern and UMW had dealt with the Petitioners fairly, equitably and lawfully.

To be sure, reductions in a working force cause disappointments and hardships. But, as pointed out by Judge Palmore of the Court of Appeals of Kentucky, there are two sides to this matter:

> "Our first conclusion is that the dovetailing of the seniority lists for Nos. 4 and 8 and No. 7 was neither a violation nor an amendment of the contract. When two mines become one they both lose their separate identities. *Appellants would have it that only No. 7 lost its identity. It could be just as well argued the othe way around.* That the tipple is located at No. 8 does not alter the fact that Nos. 4, 8 and 7, being joined together in one operating unit, are now one mine. That is what the union decided, and if the question were before us on first impression, the union being denied any decision-making authority in the premises, that is

what this court also would decide. Hence it was not necessary to amend the contract." (P.B. middle p. 60).

CONCLUSION

For reasons set forth under our question (a), this Petition should be dismissed because it was not filed within 90 days after the judgment complained of became final. Moreover, even should this Court decline to dismiss the Petition because of late filing, the issuance of a Writ of Certiorari should be denied as the Petition fails to contain any real reason, special or important, why it should be granted by this Court.

Respectfully submitted,

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